IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 325 of 2003

IN

SUIT NO. 41 of 2003

Mr.Lal Bherumal Laungani .. Plaintiff

versus

Max Cajetan Travasso & ors. .. Defendants

...

Mr.Navin Parikh, Mr.Kishor Jain, Mr.Niranjan Lapasiya i/b Niranjan & Co. for the plaintiff.

Mr.V.A. Thorat, A.G, Mr. A.Y. Bookwalla i/b P.R. Thatte for the defendants.

Mr.Y.R. Jehagirdar and Mr.D.D. Madon i/b Mahendra Bhatt for the interveners.

CORAM : D.G. KARNIK,J.

DATED : 18th February 2005.

P.C.:

1. Heard the learned counsel for the parties as also for the intervenors.

2. This motion for injunction and other reliefs is taken out by the plaintiff in a suit for specific performance of an agreement dated 8th January 1984 as modified by the two writings dated 16th November 1994.

3. The case of the plaintiff in short, is that by an agreement dated 8th January 1984, the defendants agreed to sell to the plaintiff the suit property bearing Final Plot no.393 of TPS III, Sitaladevi Temple Road, Mahim on the terms and conditions mentioned therein. The agreement is not happily worded. It is not a pure and simple agreement of sale, but is a composite agreement to lease, develop and sale. The suit property consists of land admeasuring about 10,411 sq.yards (8704.92 sq.m) on which there are several structures which are occupied by about 180 tenants. Some structures are also occupied by the defendants and/or their relatives.

Under the agreement, the defendants were to lease the property to the plaintiff initially for a period of 99 years and the plaintiff had an option to purchase the property. The plaintiff after negotiating with the tenants was to develop the property and accommodate the tenants, the landlords, the relatives of the landlords and also to offer an area of about 10,500 sq.ft to the defendants and their relative. In addition, the plaintiff was to pay a sum of Rs.20,00,000/- to the defendants. Under the agreement, the plaintiff was granted the right to recover the rent from the tenants. Poperty tax prior to the date of agreement was to be borne by the defendants. Sometimes later disputes had arisen between the plaintiff and the defendants but after negotiations parties entered into another agreement styled as "agreed minutes" on 16th November 1994. Clause 13 of the agreed minutes specifies that all the terms and conditions of the agreement dated 8th January 1984, save and except to the extent modified by the agreed minutes, were to remain in force.

4. According to the defendants, the plaintiff committed several breaches of the agreement dated 8th January 1984 as modified by the agreed minutes dated

16th November 1994. Therefore, by a notice of termination dated 16th December 1999 (received by the plaintiff on 29th December 1999), the defendants terminated the agreement of sale. The plaintiff has thereafter filed the suit for specific performance of the agreement and the minutes mentioned above. By the present motion the plaintiff prays for an injunction restraining the defendants from dispossessing or obstructing him in the use and enjoyment with the property and also restraining the defendants from creating third party interests and/or transferring the suit property as also accepting surrender of tenancy rights from the tenants. After hearing both sides, by an ad-interim order dated 17th February 2003, this Court granted ad-interim relief to the plaintiffs in terms of prayer clauses (a) and (b) subject to their depositing in the Court a sum of Rs.20,00,000/- within a period of six weeks. The said sum has since been deposited and the ad-interim injunction is still in force.

5. The learned counsel for the plaintiff submits that plaintiff is and always was ready and willing to perform his part under the agreement dated 8th January 1984 and the agreed minutes dated 16th

January 1994. According to him, the plaintiff has carried out part of the development of the property, by the constructing transit accommodation for 8 tenants with whom the settlement has been reached. He has also constructed toilet units for the said tenants and has levelled the property. Further development could not be carried out nor handing of the possession by the remaining tenants did not hand over the possession and filed suits for their eviction. According to him, the plaintiff is still ready and willing to perform his remaining part of the contract and has already deposited a sum of Rs.20,00,000/- which covers the entire monetary consideration payable by the plaintiff to the defendants. According to the plaintiff, a sum of Rs.11,22,453/- has been paid to the defendants while according to the defendants only a sum of Rs.6,20,000/- has been paid to them. Leaving apart the dispute as to the past payments, it is not disputed that the entire monetary consideration payable in money has since been deposited in this Court by the plaintiff.

6. According to the defendants, the plaintiffs are not entitled to a relief for specific performance

firstly because the plaintiff was not and is not ready and willing to perform his part of the contract and has committed several breaches requiring the defendants to terminate the agreement and the agreed minutes by the notice dated 16th December 1999. Secondly, since the agreement and the agreed minutes have since been terminated, no relief for specific performance can be granted. Thirdly, they contend that the Government has proposed to acquire the property u/s.41 of the Maharashtra Housing and Area Development Authority Act (for short 'MHADA') and therefore, the agreement cannot be enforced on account of the doctrine of frustration. In my view, it is not possible to record to any finding on the points urged and particular whether the plaintiff has committed the breach of the agreement, without trial. There is a positive averment by the plaintiff that he is and always was ready and willing to perform his part of the contract which is denied by the defendants. It is also not possible at this stage without trial and evidence to record any finding as to whether the plaintiff always was and is ready and willing to perform his part of the agreement. Suffice it to say that the plaintiff has deposited in this Court the entire monetary consideration. On a

query by me as to the performance of the other part of contract viz. constructing and handing over possession of 10,500 sq.ft. of the built up area to the defendants and their relatives, the learned counsel for the plaintiff states that in order to show his bonafides and as a security the plaintiff is willing to deposit in this Court amount equivalent to the market value of the built up property of 10,500 sq.ft. to be given to the defendants. The learned counsel further submits that the market rate of the residential property in the area of the suit property is between Rs.3,500/- to Rs.4,000/- per sq.ft. The market price of 10,500 sq.ft of the built up area to be given to the defendants would therefore, be in the vicinity of Rs.4 crores and the plaintiff is willing to deposit the said sum of Rs.4 crore in the Court.

7. As regards the contention of the defendant that the agreement has become unenforceable by frustration on account of proposed acquisition of the suit property u/s.41 of the MHADA, the learned counsel states that the plaintiff has filed a Writ Petition no.2779 of 2004 challenging the proposed action of the Government for acquisition u/s.41 of MHADA. The said Writ Petition is pending and in view

thereof no further steps have been taken by the Government for issuance of a notification or acquisition of the land u/s.41 of the MHADA. Since the Writ Petition is pending and no further steps have been taken, it cannot at this stage be held that the agreement has become unenforceable on account of frustration.

8. Mr.Jahagirdar, learned counsel for the tenants submits that the tenants are in a quandry whether to pay the rent to the plaintiff or the defendants and who is their landlord. The tenants are free to take their stand in the suits for possession filed against them by the plaintiff and/or raise whatever contentions which they desire to raise. In my view, the rights and contentions of the tenants cannot be adjudicated upon at this stage of the present litigation.

9. Taking an overall view of the facts and circumstances and taking into consideration that ad-interim was granted by this Court after hearing the parties on 11th February 2003 and which is in force till today and further taking into consideration the fact that at this stage and without

evidence it is not possible to decide whether the plaintiff has committed a breach of the contract and whether he always was ready and willing to perform his part of the contract and also take into consideration the fact that the plaintiff has offered to deposit in this Court a sum of Rs.4 crores being the present market value of the 10,500 sq.ft. of the built up area to be given to the defendants and their relatives it would be inappropriate to modify the ad-interim injunction already granted by this Court. Hence, I pass the following order:-

10. Ad-interim order passed by this Court on 17th February 2003 is confirmed till the disposal of the motion subject to the condition that the plaintiff deposits in this Court a sum of Rs.Four crores within a period of eight weeks, failing which the injunction order shall stand vacated automatically and without further reference to the Court.

11. Money, if deposited, be invested in a nationalised bank of the choice of the plaintiff if such choice is indicated at the time of the deposit or else in the State Bank of India initially for a period of 13 months to be renewed from time to time,

till the final disposal of the suit or until further orders.

D.G. KARNIK, J